Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Willmar Electric Service, Inc.,
a Minnesota corporation,
Petitioner,

v.

M. Michael Cooke, as Executive Director of
Colorado Department of Regulatory Agencies, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under Colorado statutory law, all electrical contractors performing work in the State must maintain a specific ratio of apprentice electricians to journeymen electricians on each job site. The law applies to all electrical contractors, including those that maintain apprenticeship and training programs covered by the Employee Retirement Income Security Act ("ERISA"). The questions presented for review in this case are:

> Is the Colorado ratio law, which dictates certain aspects of the benefits provided by ERISA apprenticeship and training plans and effectively limits the maximum number of beneficiaries such plans may have, preempted by ERISA?
>
> If the Colorado ratio law "relates to" ERISA apprenticeship and training plans, is the law nevertheless saved from preemption merely because it deals with matters that are traditionally regulated by the State?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Willmar Electric Service, Inc. There is no parent or publicly held company that owns 10% or more of Willmar's stock. Respondents are M. Michael Cooke, as Executive Director of Colorado Department of Regulatory Agencies; Bruce Douglas, as Director of the Colorado Division of Registrations; George Waterhouse, as Program Administrator of the Colorado State Electrical Board; Larry A. Deputy, Rick Filson, Kenneth Mackey, Timothy Miller, Brian Murray, Donald R. Clark, Rolf Philipsen, Robert Saint, and Timothy Thompson, as Members of the Colorado State Electrical Board.

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The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 212 F.3d 533 (10th Cir. 2000). A copy of the opinion is reprinted in Appendix ("App.") A at pages 1a-14a. The district court's order granting summary judgment is reported at 45 F. Supp.2d 1099 (D. Colo. 1999). A copy of the order is reprinted in App. B at pages 15a-25a.

JURISDICTION

The Tenth Circuit issued its opinion in this case on May 16, 2000. Willmar filed a petition for rehearing *en banc* on May 30, 2000. The court denied the petition on June 12, 2000. A copy of the court's order is reprinted in App. C at pages 26a-27a. This petition is filed within 90 days of the Tenth Circuit's denial of Willmar's petition for rehearing *en banc*. This Court has jurisdiction of this matter under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1144(a)

(a) Supersedure; effective date

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Colo. Rev. Stat. § 12-23-110.5(1) [1]

Apprentices - supervision - registration - discipline.

(1) Any person may work as an apprentice but shall not do any electrical wiring for the installation of electrical apparatus or equipment for light, heat, or power except under the supervision of a licensed electrician. The degree of supervision required shall be no more than one licensed electrician to supervise no more than one apprentice at the jobsite.

STATEMENT OF THE CASE

The State of Colorado has enacted a statute that regulates the supervision of apprentice electricians. In relevant part, the statute provides that "[a]ny person may work as an apprentice but shall not do any electrical wiring for the installation of electrical apparatus or equipment for light, heat, or power except under the supervision of a licensed electrician. The degree of supervision required shall be no more than one licensed electrician to supervise no more than one apprentice at the jobsite." C.R.S. § 12-23-110.5(1) (the "ratio requirement"). The Colorado State Electrical Board ("Board"), through the defendants/respondents, is responsible for enforcement of the ratio requirement.

---

[1] In 1999, the Colorado legislature amended Section 12-23-110.5(1) to require a ratio of one journeyman electrician to three apprentice electricians at each jobsite. The amendment does not render this controversy moot. *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 660-63 (1993).

Willmar is a Minnesota corporation that is performing or has performed work as an electrical contractor in approximately 31 states, including Colorado. The company has utilized, is utilizing or intends to utilize apprentices on projects in every state in which it has worked, is working or intends to work, including Colorado.

Willmar has established and maintains an apprenticeship and training program that is covered by ERISA. All of the company's apprentices are required to participate in the program and, therefore, are beneficiaries under the plan. The apprentices must complete a formal education program and receive practical on-the-job training and experience while working. The on-the-job training and experience in electrical work is a necessary and integral part of the program; and individuals cannot participate in the program unless they are employed in an apprentice capacity and are performing work under the instruction and supervision of a journeyman electrician.

On January 6, 1998, an inspector from the Board conducted an inspection of Willmar's operation at a project in Burlington, Colorado. The inspector determined that Willmar was violating the Colorado State Electrical Act by employing four unregistered apprentices to perform electrical work and by failing to maintain a one-to-one ratio of journeyman electricians and apprentice electricians. On March 9, 1998, the Board issued a formal charge against Willmar, which the company answered on April 8, 1998. On July 13, 1998, the parties resolved all issues relating to Willmar's alleged violation of the ratio requirement, except the federal preemption issue presented in this case. Generally, Willmar admitted to a violation of the ratio requirement; paid a $4,000 fine; agreed to comply with the ratio requirement in the future, unless a court determined that the requirement is

preempted by federal law or otherwise is unenforceable; and agreed to a nine-month suspension of its electrical contractor registration and an 18-month probation. The suspension was held in abeyance pending successful completion of the probation.

On April 28, 1998, Willmar filed a complaint in the United States District Court for the District of Colorado seeking a declaration that the ratio requirement is preempted by ERISA and an order enjoining the defendants from enforcing the statute against Willmar. The district court had jurisdiction of Willmar's claims under 28 U.S.C. §§ 1331 and 1367. On October 5, 1998, the parties filed cross-motions for summary judgment. The district court entered an order granting the defendants' motion for summary judgment on all claims and denying Willmar's cross-motion on March 26, 1999. The court agreed with the parties that Willmar's apprenticeship and training program is an employee welfare benefit plan covered by ERISA, but held that ERISA does not preempt the ratio requirement.

On April 29, 1999, Willmar timely filed a notice of appeal with the Tenth Circuit. The Tenth Circuit had jurisdiction of the appeal under 28 U.S.C. § 1291. On May 16, 2000, the Tenth Circuit affirmed the district court's judgment. Like the district court, the Tenth Circuit found that Willmar's apprenticeship and training program is an employee welfare benefit plan covered by ERISA, but held that ERISA does not preempt the ratio requirement. Relying on *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997), the court reasoned that the Colorado ratio requirement falls within an area of traditional state concern and outside the area of ERISA's concerns, which it defined as "reporting, disclosure and fiduciary requirements." App. A at pp. 9a-

10a. The court further reasoned that the Colorado ratio requirement imposes only an indirect economic burden on ERISA apprenticeship and training programs. App. A at pp. 11a-12a.

Willmar timely filed a petition for rehearing *en banc*, which the court denied on June 12, 2000.

ARGUMENTS FOR GRANTING THE WRIT

The Tenth Circuit's decision directly conflicts with the Eighth Circuit's decision in *Boise Cascade Corp. v. Peterson*, 939 F.2d 632 (8th Cir. 1991). Moreover, this case presents an important question of federal law that should be decided by this Court.

This Court has not yet addressed whether ERISA preempts State laws that dictate either the benefits that an employer must provide under an ERISA apprenticeship and training program or the manner in which those benefits must be provided. Stated more broadly, this Court has not yet addressed whether ERISA preempts State laws that directly affect the benefits, which take the form of direct services to the beneficiary, provided by apprenticeship and training plans, day care plans, pre-paid legal service plans, or direct medical care plans that are covered by ERISA. The Court, of course, consistently has held that ERISA preempts State laws that directly impact monetary benefits provided by an ERISA plan. Willmar contends that those decisions should control in this case. The Tenth Circuit, however, determined that those decisions were inapposite. The court ruled instead that this case is controlled by this Court's decisions regarding State laws that have only an indirect economic influence on ERISA plans. As more fully explained below, Willmar requests the Court to grant its writ in this case to resolve the

conflict between the Eighth Circuit and Tenth Circuit and to address whether ERISA preempts State laws that directly affect the benefits provided by ERISA apprenticeship and training programs.

In *Boise Cascade*, the Eighth Circuit held that a Minnesota rule regulating the ratio of licensed pipefitters to apprentice pipefitters related to the plaintiffs' apprenticeship programs and, therefore, was preempted by ERISA. *Id.* at 638; *see also Associated Builders and Contractors v. Perry*, 817 F. Supp. 49 (E.D. Mich. 1992) (holding that Michigan ratio requirement preempted by ERISA); *Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Dep't of Public Safety*, United States District Court for the District of Minnesota, Civil File No. 94-97 (MJD/MJJ) (unpublished order dated August 10, 2000) (reprinted in App. D at pp. 28a-32a) (concluding that *Dillingham* did not overrule *Boise Cascade* and that certain Minnesota rules relating to the training of apprentice sprinkler fitters are preempted by ERISA). In 1990, the Minnesota Department of Labor adopted a rule that required all contractors to maintain a ratio of "'[o]ne pipefitter trainee [apprentice] to the first licensed pipefitter; and . . . [o]ne pipefitter trainee for every additional three licensed pipefitters after that . . . .'" *Boise Cascade*, 939 F.2d at 634 n.1 (quoting Minn. R. pt. 5230.0110, subpt. A (1990)). Boise Cascade and others filed suit, alleging that the rule related to their apprenticeship programs and, therefore, was preempted by ERISA and the National Labor Relations Act. The plaintiffs filed motions for preliminary and permanent injunctive relief; and the State filed a motion for summary judgment. The trial court granted the State's motion for summary judgment and denied the plaintiffs' motions for preliminary and permanent injunctions. The Eighth Circuit reversed, stating:

> We conclude that the minimum jobsite ratio rule "relates to" employee benefit plans covered by ERISA, that is, plaintiffs' apprenticeship programs, within the meaning of ERISA's § 514(a) . . . . The minimum jobsite rule was specifically designed to affect employee benefit plans. The very purpose of the minimum jobsite ratio rule was to require plaintiffs and other employers to train their apprentices in accordance with the minimum jobsite ratio rule. Application of the minimum jobsite ratio rule would also have exposed plaintiffs and other employers to conflicting or inconsistent state and local regulations.

Id. at 637.

The Eighth Circuit's decision, unlike that of the Tenth Circuit, is consistent with this Court's previous decisions interpreting ERISA preemption. This Court long has held that ERISA preempts State laws that dictate or directly affect the terms of employee benefit plans. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1993) (holding that ERISA preempts state laws that forbid discrimination by employee benefit plans on the basis of pregnancy and require employers to pay sick-leave benefits to employees that are unable to work because of pregnancy or other non-occupational disabilities); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (holding that ERISA preempts state law that prohibits the reduction of pension benefits by the amount of workers' compensation benefits received); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (holding that ERISA preempts state anti-subrogation law). Like the state laws at issue in *Shaw*, *Alessi*, and *FMC*, the state laws at issue in *Boise Cascade* and this case have a direct effect on employee benefit

plans. As the Eighth Circuit recognized, such laws "[are] specifically designed to affect employee benefit plans. The very purpose of [such requirements is] to require . . . employers to train their apprentices in accordance with the minimum jobsite ratio rule." Consequently, such laws have a clear "connection with or reference to" ERISA apprentice and training plans.

The Tenth Circuit's reliance on *Dillingham* in this case is misplaced. In *Dillingham*, which involved a state law requiring the payment of prevailing wages to apprentices in unapproved training programs, as well as *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), which involved a state statute requiring hospitals to collect surcharges from patients covered by commercial insurers and certain HMOs, and *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997), which involved a state tax on the gross receipts of health care facilities, this Court addressed whether ERISA preempts State statutes that have an "indirect economic influence" on employee benefit plans, but do not "bind plan administrators to any particular choice" or "preclude uniform administrative practice or the provision of a uniform interstate benefit package if a plan wishe[d] to provide one." *Travelers*, 514 U.S. at 659-60. This Court concluded that, in such cases, it would "go beyond the unhelpful text" of Section 514(a) and "look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656. However, in this case, as in *Boise Cascade*, the State law at issue had more than an "indirect economic influence" on employee benefit plans; the law was "specifically designed to affect employee benefit plans." Thus, *Dillingham*, *Travelers* and *DeBuono* are factually inapposite.

Moreover, while the decisions in *Dillingham*, *Travelers* and *DeBuono* are consistent with the purposes and goals of ERISA preemption, the Tenth Circuit's decision is not. The purpose of ERISA preemption is to minimize the burden on employers of inconsistent and conflicting State and local regulations and to "ensure[] that the administrative practices of a benefit plan will be governed by only a single set of regulations." *Fort Hallifax Packing Co. v. Coyne*, 482 U.S. 1, 8-11 (1987); *Shaw*, 463 U.S. at 105 n.25. ERISA preemption also was designed to and has the effect of protecting employees' interests. *Shaw*, 463 U.S. at 105 n.25. In this case, unlike *Dillingham*, *Travelers* and *DeBuono*, the State law at issue clearly "bind[s] plan administrators to [a] particular choice" and "preclude[s] uniform administrative practice or the provision of a uniform interstate benefit package if [the] plan wishe[d] to provide one." The Tenth Circuit recognized that Willmar would be subject to conflicting ratio requirements absent the preemptive effect of ERISA, App. A at p. 13a, but, in order to maintain its reliance on *Dillingham*, was forced to discount the importance of that problem. (This Court, of course, did not have to address that problem in *Dillingham*.) If the Tenth Circuit had relied on *Shaw*, *Alessi*, and *FMC*, and had followed the Eighth Circuit, its decision would have been consistent with the purposes and goals of ERISA preemption.

The Tenth Circuit also misapplied language in *Dillingham* to craft what amounts to an exception to ERISA preemption where the State statute involves an area of traditional State regulation. In *Dillingham*, this Court reiterated the well-established proposition that "where 'federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest

purpose of Congress."'" *Dillingham*, 519 U.S. at 325 (quoting *Travelers*, 514 U.S. at 655 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))). Relying on that proposition, the Tenth Circuit effectively determined that ERISA does not preempt the ratio requirement simply because it falls within an area of traditional state regulation and "outside the area of ERISA's concerns – i.e., reporting, disclosure and fiduciary requirements." ERISA's language does not support the court's decision, nor do the decisions of this Court. This Court has consistently held that ERISA preemption "was meant to sweep more broadly than 'state laws dealing with the subject matters covered by ERISA[,] reporting, disclosure, fiduciary responsibility, and the like.'" *Travelers*, 514 U.S. at 661 (quoting *Shaw*, 463 U.S. at 98). Moreover, in *Dillingham*, this Court recognized that ERISA "certainly contemplated the pre-emption of substantial areas of traditional state regulation." *Dillingham*, 519 U.S. at 330. Thus, the Tenth Circuit placed too much emphasis on the fact that the Colorado ratio requirement falls within an area of traditional state regulation.

In sum, the Tenth Circuit erroneously concluded that the Colorado ratio requirement has only an "indirect economic influence" on ERISA apprenticeship and training programs. The Eighth Circuit has held that such laws directly affect employee welfare benefit plans and, therefore, are preempted by ERISA. This Court has held that State laws that directly affect monetary benefits provided by an employee welfare benefit plan also are preempted by ERISA. The Court, however, has not addressed whether ERISA preempts State laws that dictate or directly affect the benefits provided by ERISA apprenticeship and training programs – the issue clearly presented in this case and framed by the conflict between the Eighth Circuit and the Tenth Circuit.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed May 16, 2000]

No. 99-1221

WILLMAR ELECTRIC SERVICE, INC., A Minnesota Corporation
Plaintiff-Appellant,

v.

M. MICHAEL COOKE, as Executive Director of Colorado Department of Regulatory Agencies; BRUCE DOUGLAS, as Director of the Colorado Division of Registrations; GEORGE WATERHOUSE, as Program Administrator of the Colorado State Electrical Board; LARRY A. DEPUTY, RICK FILSON, KENNETH MACKEY, TIMOTHY MILLER, BRIAN MURRAY, DONALD R. CLARK, ROLF PHILIPSEN, ROBERT SAINT, and TIMOTHY THOMPSON, as Members of the Colorado State Electrical Board,
Defendants-Appellees.

INTERNATIONAL BROTHERHOOD OF)
ELECTRICAL WORKERS; IBEW)
LOCAL NO. 12; IBEW LOCAL NO. 68,)
IBEW LOCAL NO. 113; and IBEW)
LOCAL NO. 969,)
Amici Curiae.)
)

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 98-WY-939-WD)

Before **BRISCOE** and **McKAY,** Circuit Judges, and **BROWN**[*], District Judge.

OPINION

BROWN, District Judge.

The issue in this appeal is whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., preempts a Colorado statute requiring apprentices performing electrical work in Colorado to be supervised on a one-to-one basis by licensed journeyman electricians. The district court held that the Colorado law was not preempted. We exercise jurisdiction pursuant to 28 U.S.C. § 1291, and affirm.

---

[*] Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, sitting by designation.

I.

Plaintiff Willmar Electric Service, Inc., is a large multi-state contractor that performs work in numerous states, including Colorado. As of September 1, 1998, Willmar employed 60 journeyman electricians and 90 apprentice electricians. Willmar has established and maintains a regular training program in which all of its apprentice electricians are required to participate. The apprentices must complete a formal education program and receive practical on-the-job training and experience while working. Every apprentice is required to complete 100 hours of training and education each year. Willmar utilizes, and requires its apprentices to utilize, the "Wheels of Learning" training program, which was developed by the National Center for Construction Education and Research ("the Center"), a nonprofit organization that provides training to construction and maintenance craft workers throughout the country. The training is extensive and requires participants to pass written and performance tests to progress through the program. The training is provided by a Willmar employee or an employee of a local chapter of the Associated Builders and Contractors who has been certified as an instructor by the Center. The on-the-job training and experience in electrical work is a necessary and integral part of the program. Individuals cannot participate in the program unless they are employed in an apprentice capacity and are performing work under the supervision of a journeyman electrician.

The program is funded through contributions to trust funds maintained by the Center, the Construction Education Foundation of Minnesota and the Construction Education Foundation of Wisconsin. The latter two groups are

Center-accredited, nonprofit corporations that provide education and training for construction and maintenance craft workers in Minnesota and Wisconsin, respectively. The costs and expenses of operating the apprenticeship program, including all direct training expenses, are paid from the trust funds.

Willmar's apprenticeship and training program is an employee welfare benefit plan covered by ERISA. See 29 U.S.C. § 1002(l).

Colorado dictates certain standards for apprentice electricians as part of the state's regulation of professional and occupational licensing. At the time relevant to this suit, section 12-23-110.5(l) of the Colorado Revised Statutes provided:

> Any person may work as an apprentice but shall not do any electrical wiring for the installation of electrical apparatus or equipment for light, heat, or power except under the supervision of a licensed electrician. The degree of supervision required shall be no more than one licensed electrician to supervise no more than one apprentice at the jobsite.

C.R.S. § 12-23-110.5(l) (West 1998)[1] (emphasis added). The defendants, as members of the Colorado State Electrical Board, are responsible for enforcing this statute.

On January 6, 1998, Willmar Electric was cited by an inspector from the Colorado State Electrical Board for violating the statute by failing to maintain a one-to-one ratio of journeyman electricians to apprentices at a jobsite. The apprentices who were working for Willmar on that project were active participants in the Willmar apprenticeship training program. Willmar subsequently filed a complaint for declaratory and injunctive relief in the U.S. District Court for the District of Colorado, asserting that the Colorado statute was preempted by ERISA and was unenforceable. The district court granted summary judgment to the defendants, finding the Colorado statute was not preempted because it "makes no reference to ERISA and any relationship it may have to ERISA is at most peripheral." Aplt. App., Exh. 13 at 10. Willmar appeals, arguing that the district court misapplied the relevant law.

We review a grant of summary judgment de novo, applying the same legal standard used by the district court under Fed.R.Civ.P. 56(c). See Richmond v. ONEOK, Inc., 120 F.3d 205, 208 (10th Cir. 1997) . "Summary judgment is

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[1] This provision was amended by the Colorado legislature in 1999 and now provides that "[t]he degree of supervision required shall be no more than one licensed electrician to supervise no more than three apprentices at the jobsite." C.R.S. § 12-23-110.5(1) (West Group 2000). The change in the Colorado law does not appear to render the instant controversy moot because Willmar is subject to an ongoing penalty for its violation of the predecessor statute.

appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" Id. (quoting Rule 56(c)).

II.

ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 90 (1983). Among other things, it sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility for pension benefit and welfare benefit plans. Id. at 91. Section 1144(a) of Title 29 U.S.C. provides that, with certain exceptions, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ."

In Shaw the Supreme Court said that a law "relates to" an employee benefit plan "if it has a connection with or reference to such a plan." Id., 463 U.S. at 96-97. The Colorado statute at issue here clearly does not make reference to[2] an ERISA plan; the preemption question thus turns on whether the statute has a "connection with" such a plan. In New York State Conf. Of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995), the Court observed that "connections" with something may be infinite,

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[2] A state law has "reference to" ERISA plans where it acts immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law's operation. California Div. Of Labor Stds. Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 325 (1997). Neither of these conditions is present in this case.

and the term therefore provides no real gauge to the scope of preemption. Instead, the Court said it would look to the objectives of ERISA as a guide to the scope of the state law that Congress understood would survive, as well as to the effect of the state law on ERISA plans.

The principal object of ERISA is to protect plan participants and beneficiaries. Boggs v. Boggs, 520 U.S. 833, 845 (1997). In California Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316 (1997), the Court explained:

> "In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employee benefits from accumulated funds. To that end, it established extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator."

Id. at 326-27 (quoting Massachusetts v. Morash, 490 U.S. 107, 115 (1989)). In Travelers the Court also observed that "[t]he basic thrust of the preemption clause . . . was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." Travelers, 514 U.S. at 657. Because of this goal, the Court noted, in several cases ERISA had been found to preempt "state laws that mandated employee benefit structures or their administration." Id. at 658.

Like the instant case, Dillingham, supra, dealt with a state law's effect on an apprenticeship training program that was part of an ERISA plan. In Dillingham, a California law required contractors on public projects to pay apprentices the prevailing journeyman wage unless the apprentice was from a program approved by the state. Id., 519 U.S. at 319-20. A subcontractor who hired apprentices through an unapproved program challenged the law, arguing it was preempted by ERISA. In addressing this claim, the Supreme Court first stated that where "federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the 'assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Id. at 325. The Court noted that apprenticeship training standards and the wages paid on public works had long been regulated by the States. Id. at 330. Although this fact alone would not prevent preemption, the Court concluded that the California law was far-removed from the objectives of ERISA:

> The wages to be paid on public works projects and the substantive standards to be applied to apprenticeship training programs are, however, quite remote from the areas with which ERISA is expressly concerned – "reporting, disclosure, fiduciary responsibility, and the like." A reading of [§ 1144(a)] resulting in the pre-emption of traditionally state-regulated substantive law in those areas where ERISA has nothing to say would be "unsettling." Given the paucity of indication in ERISA and its legislative history of any intent on the part of Congress to pre-empt state

> apprenticeship training standards, or state prevailing wage laws that incorporate them, we are reluctant to alter our ordinary "assumption that the historic police powers of the State were not to be superseded by the Federal Act."

Id. at 330-31 (citations omitted). Thus, the apprentice wage law did not regulate an area that Congress intended ERISA to cover. As for the effects of the law, the Court noted that it did not bind ERISA plans to anything because a contractor could still hire apprentices from an unapproved program -- it just had to pay a higher wage. Thus, "the effect of [the law] on ERISA apprenticeship programs . . . is merely to provide some measure of economic incentive to comport with the State's requirements. . . ." Id. at 332. In this respect, the Court said, the law was "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate." Id. at 334 (quoting Travelers, supra).

III.

As Dillingham pointed out, apprenticeship training standards are matters traditionally regulated by the States. The Colorado statute at issue in this case falls within that sphere. The appropriate degree of supervision required for apprentices performing electrical work is a matter related to occupational and public safety and, as such, has traditionally been subject to the state's police powers. Cf. DeBuono v. NYSA-ILA Med. & Clinical Serv. Fund, 520 U.S. 806, 814 (1997) (the historic police powers of the State include the regulation of matters of health and safety). The subject of the

Colorado law, like the California statute in Dillingham, is outside the area of ERISA's concerns -- i.e., reporting, disclosure and fiduciary requirements put in place to protect employee benefits. Nothing in ERISA's legislative history suggests that Congress intended to preempt apprenticeship training standards. Dillingham, 519 U.S. at 331.

Despite these factors, Willmar advances several reasons why it believes the Colorado statute should be preempted. First, it points out that other courts have found similar ratio requirements to be preempted. Citing Boise Cascade Corp. v. Peterson, 939 F.2d 632 (8th Cir. 1991) and Associated Builders and Contractors v. Perry, 817 F.Supp. 49 (E.D. Mich. 1992). We agree with the district court, however, that these cases are not persuasive because they preceded the Supreme Court's delineation of the limits of ERISA preemption in cases such as Travelers, Boggs, Dillingham, and DeBuono. Although Willmar correctly points out that the Supreme Court has not overruled its early ERISA precedents (including those upon which Boise Cascade and Associated Builders were based), a proper assessment of ERISA preemption now must take into account the limits recently recognized by the Court. Cf. DeBuono, 520 U.S. at 812-13 (criticizing court of appeals for adhering to expansive interpretation of "relate to" and failing to give effect to Travelers' rejection of a strictly literal reading). Dillingham is particularly instructive here insofar as it suggests that ERISA's objectives are not interfered with by state regulation of substantive apprentice training standards. Boise Cascade and Associated Builders did not take these limits into account, and we cannot consider them to be reliable authorities on the question presented.

Willmar next argues that the Colorado law "relates to" an ERISA plan because the one-to-one ratio requirement "results in an artificial limit on the number of apprentices that may be trained. . . ." Aplt. Br. at 14. There is no direct restraint in the Colorado law on the number of apprentices that may be trained. Rather, the limit to which Willmar refers is the economic burden of requiring one-to-one supervision of apprentices. The Supreme Court has recognized that laws of general applicability inevitably affect ERISA plans, sometimes by increasing costs, but that fact alone does not warrant a finding that Congress necessarily intended to displace regulation of an area traditionally regulated by the States. Thus, in Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1998), the Court held that ERISA did not preempt a general state garnishment statute despite the fact that the law's application imposed increased administrative costs and burdens on benefit plans. Similarly, in Travelers, the Court found no preemption of a state law that imposed a surcharge on patients with certain kinds of insurance, despite the fact that the law increased the cost of benefits under some ERISA plans. See Travelers, 514 U.S. at 662. And in Dillingham the Court found that the economic effect of a state law governing apprentice wages was not a sufficient basis for preemption. We see no material difference between these cases and the instant case, and we likewise conclude that the economic effect of the Colorado ratio requirement is not sufficient to warrant preemption.

Willmar also contends the Colorado law should be preempted because it invades the federal province of benefit plans and improperly "dictates to the contractor the 'teacher-to-student' ratio that must be used in the

apprenticeship program. . . ." Aplt. Br. at 14. An examination of the objectives of ERISA and the effects of the Colorado law persuades us that this is not the type of regulation Congress had in mind in the preemption clause. The primary effect of the ratio requirement is to indirectly increase the cost of apprentice training. In this respect it is directly analogous to the apprentice wage law at issue in Dillingham.[3] In requiring such supervision the Colorado law neither mandates nor limits the granting of benefits to employees. Cf. Travelers, 514 U.S. at 664 (the law did "not impose the kind of substantive coverage requirement binding plan administrators that was at issue in Metropolitan Life."). The law is neutral in that it applies with equal force to ERISA and non-ERISA plan training of apprentices. Its subject matter falls within the apprenticeship training standards traditionally regulated by state law. All factors considered, we cannot accept Willmar's argument that the Colorado law encroaches upon the subject of welfare benefit plan regulation. It is more properly characterized as addressing occupational and public safety, a matter traditionally governed by state law. We find it implausible that Congress could have intended for such a regulation to be superseded by ERISA merely because its

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[3] Willmar argues Dillingham is factually distinguishable because the state law in that case "did not bind ERISA plans to anything." See Dillingham, 519 U.S. at 332. We cannot agree that this purported distinction warrants a different result in this case. In Dillingham if the contractor chose to hire an apprentice from a non-approved program, it was compelled by state law to pay journeyman's wages. In our view this is comparable to the manner in which the Colorado law affects the Willmar training program – it does not prevent training, but it increases the cost associated with doing so.

application has some impact on an ERISA plan. See Dillingham, supra. Cf. Shea v. Esensten, ___ F.3d ___, 2000 WL 336674, *6 (8th Cir., Mar. 31, 2000) (state regulation of ethical responsibilities of physicians was not preempted by ERISA); Boyle v. Anderson, 68 F.3d 1093, 1110 (8th Cir. 1995) (nothing in ERISA indicates Congressional intent to preempt state's general heath care regulations).

Willmar's final argument is that preemption is required because the Colorado law interferes with uniform administration of benefit plans. Willmar points out that various states have varying laws on the degree of supervision required for apprentices. The result of this, according to Willmar, is that it is "forced either to restructure its apprenticeship and training program to comply with the most stringent applicable ratio requirement or adopt a different program for use in each state." Aplt. Rep. Br. at 8. Willmar argues this is contrary to Congress' intent in the ERISA preemption clause "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law," to "minimize the administrative and financial burden of complying with conflicting directives among States," and to prevent conflicts in substantive law from "requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." See Travelers, 514 U.S. at 656-57. Although it is true that different apprentice supervision standards may have some effect on administration of Willmar's benefit plan, we cannot say this is enough to overcome the presumption that Congress did not intend to supersede state regulation of this area of law. A similar effect on uniform plan administration would assuredly arise from the apprentice wage law in Dillingham and the state tax at issue

in DeBuono, but the Supreme Court found no grounds for preemption in those cases. We conclude that the Colorado law is "one of 'myriad state laws' of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute." DeBuono, 138 L.Ed.2d at 30. See also Travelers, 514 U.S. at 661 (there is no preemption "if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability"). ERISA therefore does not preempt the Colorado apprentice supervision requirement.

IV.

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Dated March 26, 1999]

No. 98-WY-939-WD

WILLMAR ELECTRIC SERVICE, INC., a Minnesota corporation,
Plaintiff,

vs.

JOSEPH GARCIA, as executive Director of Colorado Department of Regulatory Agencies; BRUCE DOUGLAS, as Director of the Colorado Division of Registrations; GEORGE WATERHOUSE, as Program Administrator of the Colorado State Electrical Board; LARRY A. DEPUTY, RICK FILSON, KENNETH MACKEY, TIMOTHY MILLER, BRIAN MURRAY, KRISTIN NORRIS, ROLF PHILSEN, ROBERT SAINT, AND TIMOTHY THOMPSON, as Members of the Colorado State Electrical Board,
Defendants.

ORDER ON SUMMARY JUDGMENT

This matter comes before the Court on Plaintiff's and Defendants' Cross Motions for Summary Judgment. The Court, having heard oral argument in this matter, having reviewed the parties' motions, and being otherwise fully advised in the premises, FINDS and ORDERS as follows:

Background

In this case, the Plaintiff, Willmar Electric Service, Inc., is a large multi-state electrical contractor. Plaintiff is based in Minnesota and performs work in approximately 31 states, including Colorado. Since 1985, Plaintiff has completed 12 projects and continues to solicit business in Colorado. Plaintiff utilizes a training program for its apprentice electricians in which apprentices must participate in a variety of training courses. These courses require apprentices to successfully complete both written and performance tests. The program was developed by the National Center for Construction Education and Research, a non-profit organization that provides training to construction and maintenance craftworkers throughout the country. The parties agree that Plaintiff's apprenticeship and training program is an employee welfare benefit plan recognized by the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (hereinafter ERISA).

As part of its professional and occupational licensure system, Colorado dictates certain standards for apprentice electricians. Colorado Revised Statutes (C.R.S.) § 12-23-110.5(l) provides:

> Any person may work as an apprentice but shall not do any electrical wiring for the installation for electrical apparatus or equipment for light, heat, or power except under the supervision of a licensed electrician. The degree of supervision required shall be no more than one licensed electrician to supervise no more than one apprentice at the jobsite.

Essentially, this statute sets forth a ratio requirement whereby one licensed journeyman electrician must directly supervise each apprentice electrician on a particular jobsite. This statute applies uniformly to all electrical contractors operating in Colorado.

On January 6, 1990, an inspector from the Colorado State Electrical Board visited the Plaintiff's jobsite. The inspector determined that Plaintiff violated (C.R.S.) § 12-23-110.5(1) at this jobsite, because it allowed more than one apprentice electrician be supervised by one journeyman electrician. The inspector issued a citation to Plaintiff for violation of the ratio statute. On March 9, 1998, the Electrical Board issued a formal charge against Plaintiff alleging that it violated the statute by employing four unregistered apprentices to perform electrical work and by failing to maintain the required ratio of journeyman electricians to apprentice electricians.

On July 13, 1998, the parties resolved all issues relating to Plaintiff's alleged violation of the ratio requirement, except the federal preemption issue addressed herein. Plaintiff admitted a violation of the ratio requirement and agreed to comply with the requirement unless a court

determined that federal law preempted or other otherwise rendered unenforceable the ratio requirement statute.

Standard of Review

The standard of review for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is well established. Summary judgment is appropriate if the pleadings, depositions, and answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. In applying this standard, the Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Moya v. United States*, 35 F.3d 501, 504 (10th Cir. 1994); *Kaul v. Stephan,* 83 F.3d 1208, 1212 (10th Cir. 1996).

In the present case, the parties have stipulated to the facts which are germane to the issue now before the Court. The relevant law will be applied in the context of these agreed upon facts.

Discussion

The issue which the parties have brought before the Court, whether ERISA preempts a state statute addressing occupational regulation, is highly contentious and frequently litigated. Since the enactment of ERISA in 1974, the United States Supreme Court has decided myriad cases regarding ERISA preemption of various sorts of state law. *See California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.,* 519 U.S. 316, 334

(1997) (Scalia, J., concurring). These decisions reveal that a concrete test for ERISA preemption remains largely elusive. Nonetheless, ERISA's preemption clause interpreted in numerous Supreme Court opinions establishes a framework from which this Court must decide the present issue of preemption.

Effective January 1, 1975, the ERISA preemption clause requires that "(ERISA) shall supercede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The issue in this case is whether the Plaintiff s plan relates to ERISA. Much attention has been given to the interpretation of the "relates to" provision. The Supreme Court's early interpretation of the preemption provision was that state law relates to ERISA if it has a connection with or makes reference to an ERISA plan. *See e.g., Shaw v. Delta Airlines Inc., et. al.*, 463 U.S. 85, 96-97 (1983). In the present case it is clear that the Colorado Statute does not make reference to ERISA. Consequently, the overarching issue is whether the statute has a connection with ERISA and is therefore preempted.

The Supreme Court has long acknowledged that ERISA's preemption provision is broad. Over the years, the Court has employed many terms to describe the expansive nature of ERISA.[1] *Dillingham*, 519 U.S. at 324. The

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[1] Since 1995, in a number of different cases, the Court has considered the preemption provision as having a "broad scope," an "expansive sweep," and as being "broadly worded," "conspicuous for its breadth," and "deliberately expansive." *Dillingham*, 519 U.S. at 324.

Court's efforts to apply the preemption provision have yielded a two part inquiry. A law "relates to" a covered employee benefit plan if it (1) "has a connection with" or (2) "reference to" such a plan. *Id.*

Unfortunately, application of this standard has proven to be untenable. Recently, the Court recognized that such an "uncritical literalism" in applying the standard offered scant utility in determining Congress' intent as to the extent of ERISA preemption. *Id.* at 325. In fact, Justice Scalia has astutely observed that "applying the 'relates to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." *Dillingham,* 519 U.S. at 335. In a series of recent decisions, the Supreme Court has sought to develop a clearer understanding of what it means for a statute to "relate to ERISA." *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company, et al.,* 514 U.S. 645 (1995); *Dillingham,* 519 U.S. 316; *DeBuono v. NYSA-ILA Medical and Clinical Services Fund,* 520 U.S. 806 (1997). In *Dillingham*, the Court discarded its vague interpretations of the past and now looks to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive as well and the nature and effect of the state law on ERISA plans. *Dillingham*, 519 U.S. at 325.

When Congress legislates in an area traditionally occupied by the States, this Court must start with the assumption that the historic police powers of the States were not to be superceded by Federal enactment unless that was the clear and manifest purpose of Congress. *Dillingham,* 519 U.S. at 325; *See also California, et. al., v. ARC America*

Corporation, et. al., 490 U.S. 93, 101 (1989). The statute at issue in this case is a form of occupational regulation. Occupational licensing is an area historically regulated by states. *See National Solid Waste Management Association v. Killian,* 918 F.2d 671, 686 (7th Cir. 1991). Specifically, apprenticeship standards have long been regulated by states. *Dillingham, 519 U.S.* at 330.

It stands to reason that the Colorado statute presently at issue, a ratio requirement for apprentices, is an area of occupational regulation typically governed by states. Consequently, this Court must determine if the clear and manifest purpose of Congress in enacting ERISA was to supercede Colorado's occupational licensing prerogative. *See Dillingham,* 519 U.S. at 325.

In *Dillingham* the Supreme Court addressed preemption in the context of apprenticeship standards. The Court stated:

> The wages to be paid on public works projects and the substantive standards to be applied to apprenticeship training programs are, however, quite remote from the areas with which ERISA is expressly concerned 'reporting, disclosure, fiduciary responsibility, and the like . . . A reading of § 514(a) resulting in the preemption of traditionally state-regulated substantive law in those areas where ERISA has nothing to say would be 'unsettling' . . . Given the paucity of indication in ERISA and its legislative history of any intent on the part of Congress to

> pre-empt state apprenticeship standards, or state prevailing wage laws that incorporate them, we are reluctant to alter our ordinary 'assumption that the historic police powers of the state were not to be superceded by the Federal Act.'

Dillingham, 519 U.S. at 330-31. In the majority opinion authored by Justice Thomas, the Court proceeded to hold that California's prevailing wage laws and apprenticeship standards do not have a "connection with" and therefore do not "relate to" ERISA plans. *Dillingham*, 519 U.S. at 334. This analysis and conclusion is particularly illustrative here.

Plaintiff is adamant that precedent established in *Boise Cascade Corporation v. Peterson*, 939 F.2d 632 (8th Cir. 1991) and *Associated Builders and Contractors v. Perry*, 817 F. Supp. 49 (E.D. Mich. 1992) should prompt this Court to preempt Colorado's ratio requirement statute. Plaintiff correctly points out that these cases are factually parallel to the present case. Both cases involve state apprenticeship ratio requirement statutes and both courts concluded that ERISA should preempt the state law. This Court concludes that these cases have little persuasive force since both *Boise Cascade* and *Associated Builders* (relying heavily on *Boise Cascade)* apply the broad, all encompassing, preemption language used by the Supreme Court prior to *Travelers*. The Court has rejected this approach in its most recent decisions. *See DeBuono*, 520 U.S. at 812 (observing that prior attempts to construe 'relate to' were not much help). In. all likelihood, the Eighth Circuit would resolve *Boise Cascade* much differently in the wake of *Travelers*, *Dillingham,* and *DeBuono*.

The Plaintiff's hair-splitting attempt to distinguish the factual scenario in *Dillingham* from the present case prizes form over substance. In *Dillingham,* the California prevailing wage law required contractors on public projects to pay apprentices the journeyman wage rate, rather than the lower, apprentice wage rate, unless the apprentices were enrolled in a state-approved apprenticeship program. Plaintiff claims that, unlike the Colorado ratio requirement, the statute addressed in *Dillingham* did not limit the contractors' use of apprentices, or regulate the number, training or supervision of apprentices. Plaintiff's assertions are incorrect. Like the California prevailing wage law, Colorado's ratio requirement neither limits the number of apprentices a contractor may employ nor does it regulate the training of apprentices. On the contrary, electrical contractors like Plaintiff may hire and train apprentices in accordance with their established employee welfare benefit plans. At the same time, however, these contractors must maintain the one to one journeyman to apprentice jobsite ratio requirement. The only impact the ratio requirement has on Plaintiff's employee benefit plan is that complying with the ratio requirement may induce Plaintiff to choose to employ fewer apprentices and more journeymen. Since journeymen command a higher salary than apprentices, this could cost Plaintiff more money. Therefore, the apprentice training program may have fewer participants.

This is simply an insufficient basis with which to eviscerate the Colorado ratio requirement which has existed in the same essential form since 1972. Defendants point out that the ratio requirement originally enforced through promulgated rules and Colorado State Electrical Board rulings actually predates ERISA enacted in 1974. ERISA and the ratio requirement have peacefully coexisted for over 24 years.

This Court's reasoning is supported by recent Tenth Circuit precedent. In *Fuller v. Norton*, 86 F.3d 1016, 1021 (10th Cir. 1996), the Tenth Circuit stated that "merely because state regulation might have an economic impact on a multibenefit ERISA plan, it does not automatically "relate to" an ERISA plan." The Court concluded that ERISA did not preempt the Colorado state multiple employer welfare arrangement.

The Supreme Court is resoundingly clear that *Shaw* and its progeny which promoted a broad interpretation of ERISA preemption are no longer viable.[2] Any state tax, or other law that increases the cost of providing benefits to covered employees will have some effect on the administration of ERISA plans. This does not mean, however, that every state law with such an effect is pre-empted by the federal statute, *DeBuono,* 520 U.S. at 816. In *Travelers*, the Court stated that "'preemption does not occur . . . if the state law has only a tenuous, remote or peripheral connection with covered plans, as is the case with many laws of general applicability.'" *Travelers*, 514 U.S. at 661 (quoting *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, --- n. 1). Colorado's ratio requirement is such a law of general applicability. It applies uniformly to all electrical contractors operating in the state of Colorado and it was certainly not created to thwart Plaintiff's

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[2] DeBuono, 520 U.S. at 813 (observing that "we were quite clear in that case [*Travelers*] that the text [of ERISA] could not be read to 'extend to the furthest stretch of its inderminancy, or for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere') *quoting* JJ. Roderick Hudson, World's Classics xii (1980).

apprenticeship training program. The ratio requirement statute makes no reference to ERISA and any relationship it may have to ERISA is at most peripheral.

The Court is thoroughly persuaded that Colorado's apprentice ratio statute does not "relate to" Plaintiff's apprenticeship training program in a manner which implicates preemption. Furthermore, it defies common sense and reason to use ERISA, a statute essentially designed to protect employees pension and benefit plans, to preempt state occupational regulation.

It is therefore

ORDERED that Defendant's Motion for Summary Judgment is GRANTED as to each of Plaintiff's claims for relief. IT IS FURTHER

ORDERED that Plaintiff's Motion for Summary Judgment is hereby DENIED. Plaintiff's complaint is hereby DISMISSED WITH PREJUDICE. The Parties shall bear their own costs.

DATED this 26th day of March, 1999.

/s/_____
William F. Downes
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed June 12, 2000]

No. 99-1221

WILLMAR ELECTRIC SERVICE, INC., A Minnesota Corporation
Plaintiff-Appellant,

v.

M. MICHAEL COOKE, as Executive Director of Colorado Department of Regulatory Agencies; BRUCE DOUGLAS, as Director of the Colorado Division of Registrations; GEORGE WATERHOUSE, as Program Administrator of the Colorado State Electrical Board; LARRY A. DEPUTY, RICK FILSON, KENNETH MACKEY, TIMOTHY MILLER, BRIAN MURRAY, DONALD R. CLARK, ROLF PHILIPSEN, ROBERT SAINT, and TIMOTHY THOMPSON, as Members of the Colorado State Electrical Board,
Defendants-Appellees.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; IBEW LOCAL NO. 12; IBEW LOCAL NO. 68, IBEW LOCAL NO. 113; and IBEW LOCAL NO. 969,

Amici Curiae.

ORDER

Before **BRISCOE** and **McKAY**, Circuit Judges, **BROWN***, District Judge.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

/s/_____
Deputy Clerk

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* Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

[Filed August 10, 2000]

No. 94-97 (MJD/JMM)

Minnesota Chapter of Associated Builders and Contractors, Inc. a Minnesota corporation, *Plaintiff,*	)
v.	)
Minnesota Department of Public Safety and Michael Jordan, Commissioner of Public Safety, *Defendant.*	)

ORDER

DISCUSSION

This matter is before the Court on a motion by Sprinkler Fitters Local 417 ("Intervener") to intervene and to dissolve an injunction this Court issued on March 26, 1996. The underlying case arose from a challenge to Department of Public Safety rules enforced pursuant to Minnesota's Fire Protection Industry Licensing Law. See Minn. Stat.

§ 299M.01 (1994), *et. seq.*; and Minn. R. § 7512.2100-.2400 (1994). Minnesota Chapter of Associated Builders and Contractors ("Plaintiff") argued that certain rules requiring apprentice sprinkler fitters to be registered with a state or federal apprenticeship program were preempted by the Employment Retirement Income Security Act (ERISA), 29 U.S.C. §1001, *et. seq.* By Order dated March 26, 1996, this Court enjoined Defendant from the enforcement of apprenticeship regulations due to preemption by ERISA. See Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnesota Department of Public Safety and Michael Jordan, Commissioner of Public Safety, Civ. No. 3-94-97 (March 26, 1996). In the present matter, Sprinkler Fitters Local 417 has moved to intervene and to dissolve the injunction, arguing that this Court relied on the Eighth Circuit's decision in Boise Cascade Corp. v. Peterson, 939 F.2d 632 (8th Cir. 1991) to determine that Minnesota's sprinkler fitter statute "related to" an ERISA plan and was thus preempted. Sprinkler Fitters Local 417 argues that in light of the Supreme Court's decision in California Division of Labor Standards Enforcement v. Dillingham Construction, 519 U.S. 316 (1997), this Court must undergo a specific two-part analysis. Ultimately, Sprinkler Fitters Local 417 argues that the Minnesota law in question does not "relate to" an ERISA plan. Defendant Minnesota Department of Public Safety does not object to intervention by Sprinkler Fitters. Although Defendant "takes no further position relative to whether this Court should dissolve the injunction," Defendant does not object to an order granting Intervener's injunctive relief, as it buttresses Defendant's prior position. Plaintiff opposes both the motion to intervene and the motion to dissolve the injunction. Based on the arguments of the parties, this Court determines that Sprinkler Fitters' motion is timely, involves a question of law in common with the main action, and that review of the Court's prior decision will not

unduly prejudice the adjudication of the rights of the original parties. Accordingly, Sprinkler Fitters is entitled to permissive intervention pursuant to Fed. R. Civ. Pro. 24(b). The Court now addresses Intervener's motion to dissolve the injunction.

Dillingham concerned whether the pre-emption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. § 1001 et. seq., supersedes California's prevailing wage law to the extent that the law prohibits payment of an apprentice wage to an apprentice trained in an unapproved program. 519 U.S. at 319. The State of California requires a contractor on a public works project to pay its workers the prevailing wage in the project's locale. An exception to this requirement permits a contractor to pay a lower wage to workers participating in an approved apprenticeship program. Id. The Court held that California's law does not "relate to" employee benefit plans, and thus is not preempted. Id. In making this determination, the Court applied a two-part inquiry. Id. at 324. A "law 'relates to' a covered employee benefit plan for purposes of § 514(a) 'if it [1] has a connection with or [2] a reference to such a plan.'" Id.

In analyzing whether a law "refers to" an ERISA plan, the Court found that "approved apprenticeship programs need not necessarily be ERISA plans." Id. at 325. The Court noted that under California law, an apprenticeship program "can be maintained by a single employer, and its costs can be defrayed out of that employer's general assets," characteristics which indicate that California's apprenticeship program "is not an ERISA plan." Id. at 326. The Court suggested that unfunded apprenticeship programs are not covered by ERISA. Id. at 327.

In the present matter, Plaintiff does not challenge Intervener's argument that Minnesota's statute concerning the sprinkler fitter apprentice programs is not preempted by ERISA under the "refers to" prong of the Dillingham test. Accordingly, this Court must determine whether the Minnesota's law is nevertheless preempted if it has a "connection with" an ERISA plan.

In analyzing whether a law "has a connection with" an ERISA plan, and is thus, preempted by it, the Court in Dillingham distinguished state statutes that "mandated employee benefit structures or their administration" from state statutes that had an "indirect economic influence" but did not "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself." Id. at 328. The Court found that California's prevailing wage statute was indistinguishable from New York's surcharge program, which did not bind plan administrators to any particular choice. Id. at 330. First, the Court determined that because states have traditionally regulated areas such as apprenticeship training standards, and ERISA and its legislative history offer no indication that Congress intended to preempt apprenticeship training standards or state prevailing wage laws that incorporate them, the Court began its analysis with the presumption that ERISA did not intend to supplant such state laws. Id. at 331-332. Then, the Court found that California's statute did not bind ERISA plans to anything, as no apprenticeship program is required by California law to meet California's standards. Id. at 330. The Court noted that "[i]f a contractor chooses to hire apprentices for a public works project, it need not hire them from an approved program (although if it does not, it must pay these apprentices journeyman wages)." Id. at 332. Additionally, "[u]napproved apprenticeship programs also may supply apprentices to private contractors." Id. Therefore, the Court

found, the effect of California's prevailing wage law on ERISA apprenticeship programs was merely "to provide some measure of economic incentive to comport with the State's requirements, at least to the extent that those programs seek to provide apprentices who can work on public works projects at a lower wage." Id. In sum, California's prevailing wage statute "alters the incentives, but does not dictate the choices, facing ERISA plans." Id. at 334.

The Court recognized a distinction between laws such as the California prevailing wage law, which merely created an incentive for the adoption of an approved apprenticeship plan, or the New York surcharge law, which created an "indirect economic incentive," and the statutes and rules in the present case, which required the adoption of an approved apprenticeship plan. Furthermore, the Supreme Court did not overrule its early ERISA precedents, including those upon which Boise Cascade Corp. v. Peterson, 939 F.2d 632 (8th Cir. 1991) were based. Therefore, this Court finds that Minnesota's rules and statutes providing a comprehensive framework for the training and registration of apprentices "relates to" an ERISA plan under the "connection with" prong.

ACCORDINGLY, IT IS HEREBY ORDERED THAT

Intervener's motion to intervene is GRANTED, and Intervener's motion to dissolve injunction is DENIED.

Dated: 8-9-00

/s/_____
Michael J. Davis
United States District Court judge